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81-2020

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, and
UNITED DISTRIBUTION COMPANIES

Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether section 202(c) of the Natural Gas Policy Act, 15 U.S.C. § 3342(c), is severable from section 202(a) of the Act, 15 U.S.C. § 3342(a), where there is no severability clause in the statute and where the effectiveness of the rule required by section 202(a) is expressly conditioned upon congressional review established in section 202(c).

2. Whether the constitutionality of section 202(c) of the Natural Gas Policy Act was rendered moot by the action of the Federal Energy Regulatory Commission nullifying the rule proposed pursuant to section 202(a) of the Act.

3. Whether section 202(c) of the Natural Gas Policy Act, which establishes a congressional disapproval mechanism with regard to a proposed extensive expansion of incremental pricing of natural gas, is constitutional.

4. Whether the delegation to the Federal Energy Regulatory Commission is constitutional where, absent the congressional review mechanism of section 202(c), the statute provides neither guidance nor standards for application of or exemption from incremental pricing.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals, App. at 1a-104a,[3] is not yet reported. The rule promulgated by the Federal Energy Regula-

1. Pursuant to Rule 28.1 of the Court, a listing of all corporations constituting the Interstate Natural Gas Association of America ("INGAA"), and United Distribution Companies ("UDC") and, where applicable, parents, subsidiaries and affiliates thereof, is contained in the Appendix at the end of this Jurisdictional Statement.

2. The Consumer Energy Council of America ("CECA") was joined by the Consumer Federation of America and Public Citizen as petitioners in the court of appeals. The Federal Energy Regulatory Commission was the named respondent, and United Distribution Companies, Interstate Natural Gas Association of America, American Gas Association, Process Gas Consumers Group, American Iron and Steel Institute, Georgia Industrial Gas Group, and Petrochemical Energy Group intervened in support of respondent. The United States appeared as amicus curiae in support of petitioners, and the United States Senate and the Speaker of the House of Representatives appeared as amici curiae in support of respondent. Post-judgment motions to intervene filed by the United States, the United States Senate and the Speaker of the House of Representatives were granted by the court of appeals on March 2, 1982. App. at 105a.

3. With the exception of the list required by Rule 28.1 of the Court, which is contained in the Appendix to this Jurisdictional Statement, all references to "Appendix" or "App." are to the Appendix to Jurisdictional Statement submitted April 29, 1982 by The Process Gas Consumers Group, et al., in a related case, No. 81-2008.

tory Commission ("FERC") in Order No. 80, App. at 123a-195a, is published in Volume 45 of the Federal Register at 31622 (1980). The decision of the Federal Energy Regulatory Commission denying rehearing and revoking Order No. 80, App. at 196a-203a, is reported at 45 Fed. Reg. 54741 (1980), and its decision denying rehearing of the revocation of Order No. 80, App. at 204a-206a, is reported at 45 Fed. Reg. 71780 (1980).

JURISDICTION

This is an appeal from a decision of the United States Court of Appeals for the District of Columbia Circuit holding unconstitutional section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(c). Federal jurisdiction in that court was based on section 506 of that Act, 15 U.S.C. § 3416. The judgment of the court of appeals was entered on January 29, 1982. App. at 208a-209a. A timely petition for rehearing was filed by the American Gas Association on February 26, 1982, and was denied by the court of appeals on March 10, 1982. App. at 210a. The Interstate Natural Gas Association of America ("INGAA") and United Distribution Companies ("UDC") filed a timely notice of appeal on March 17, 1982. App. at 215a-216a.[4]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution and the Natural Gas Policy Act of 1978 are set forth in the Appendix. App. at 222a-231a.

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4. INGAA and UDC had filed an initial notice of appeal on February 25, 1982, but because the American Gas Association filed a petition for rehearing a second notice of appeal was necessary.

STATEMENT OF THE CASE

1. **The Legislation And Its History**. The Natural Gas Policy Act of 1978 ("NGPA")[5] emerged from Congress after 18 months of intense debate and substantial compromise. Among other things, it did two things of particular importance to this case: (1) it brought the unregulated intrastate gas market under federal regulation (along with interstate gas already so regulated by the Natural Gas Act); and (2) it provided for higher wellhead prices for natural gas. This was the essential agreement of the conferees: regulation of the intrastate market, higher prices across the board and a promise to deregulate in the future.

In part to cushion the impact of higher prices on residential and other "high priority" gas customers, Title II of the NGPA provides for incremental pricing of gas to industrial users. Incremental pricing was a novel approach to natural gas pricing and its effects were accordingly unpredictable. In theory it was a mechanism by which the "increment" of cost attributable to the difference between high cost "new" gas and low cost "old" gas would be paid by industrial users of natural gas, thereby keeping the cost to high priority customers, *e.g.*, residential users, somewhat lower than it would otherwise be if average or rolled-in costs were payable by all. Incremental pricing would not work, however, if the industrial users that were to pay this "incremental cost" shifted to an alternate fuel such as oil or coal. Any sizeable shift of that kind would result in a reduction of the industrial "load", which would in turn leave residential customers paying not only for the higher cost gas but also, and more importantly, for a larger share of the fixed gathering, transmission and distribution costs. To reduce the likelihood of such a load shift by industrial users, Congress enacted Title II, which placed a ceiling on the "increment" of cost that could be passed through to industrial users. Provision was made whereby the incremental surcharge could not increase the cost of gas above the equivalent cost of alternate

5. Pub. L. No. 95-621, 92 Stat. 3351, 15 U.S.C. §§ 3301-3432.

fuels. Additionally, Title II provided for a phased implementation of incremental pricing so as to provide an opportunity to assess the impact of the initial phase, i.e. Phase I.

Phase I restricted the application of the incremental surcharge to large industrial users that burned natural gas as a boiler fuel. Section 201 of the NGPA required this initial program of incremental pricing to be implemented by a rule to be promulgated and put into effect by the FERC within one year of enactment.[6]

Thereafter, under Phase II of the program, Phase I could be amended to include a larger set of industrial users. Specifically section 202(a) provides that within 18 months of enactment "the Commission shall, by rule, prescribe an amendment to the [Phase I] rule ..."[7] to extend incremental pricing to other industrial (*i.e.*, non-boiler fuel) users. Significantly, however, Congress expressly limited the circumstances under which the Phase II rule could take effect. It provided that Phase II "shall take effect only as provided under subsection (c) of this section."[8] Subsection (c) in turn allows the amendment to go into effect after thirty legislative days "unless, during such 30-day period of continuous session of Congress, either House of the Congress adopts a resolution of disapproval...,"[9] *i.e.* the one-house veto. If the proposed amendment is disapproved by Congress, the FERC may not propose another amendment for six months, and *all* authority of the FERC to submit additional Phase II proposals expires at the end of a two-year period measured from the date of adoption of the first disapproval resolution.[10]

The one-house veto provision for Phase II incremental pricing was the product of a compromise between separate bills adopted by the House and the Senate with regard to natural gas regulation. The House bill brought intrastate gas under regulation, provided limited price increases for natural gas at the wellhead, and required broad incremental pricing at both the pipeline and

6. 15 U.S.C. § 3341. Phase I is now in effect.
7. *Id.* § 3342(a)(1).
8. *Id.* § 3342(a)(2).
9. *Id.* § 3342(c)(1).
10. *Id.* § 3342(c)(2)(B).

distribution levels. The Senate version, on the other hand, did not regulate intrastate natural gas, but did provide natural gas wellhead price deregulation and limited incremental pricing to the pipeline level. Thus, apart from the major difference with respect to intrastate gas regulation, fundamentally different policies for both wellhead prices and incremental pricing were adopted by the Senate and House.

The different House and Senate bills went to conference, and after ten months the Conference Committee issued a report setting forth the proposed compromise bill.[11] With regard to incremental pricing, the conferees agreed that the incremental price surcharge would initially be levied only on industries burning gas as a boiler fuel; any further extension of incremental pricing for non-boiler fuel industrial use would be proposed at a later date subject to a veto by either house of Congress. It is this agreement, largely ignored by the court below, that is in issue in this case.

The Conference Report described the exact nature of the incremental pricing agreement:

> A two stage process is utilized for identification of users who will be subject to incremental pricing. First, the Commission is required to develop a rule, within 12 months after the date of enactment, for implementation of incremental pricing applicable to certain industrial boiler fuel facilities. Second, the Commission is required to develop an amendment to the first rule, within 18 months after the date of enactment, for implementation of incremental pricing to other industrial users. This amendment to the first rule will be submitted to Congress for review. The amendment becomes effective unless disapproved by either House of Congress. If the second rule is disapproved, the Commission may submit a substitute proposal for review under the same procedure.
>
> * * *

11. S. Rep. No. 95-1126 (H.R. Conf. Rep. No. 95-1752), 95th Cong., 2d Sess. [hereinafter cited as Conference Report], *reprinted in* [1978] U.S. Code Cong. Admin. News 8983.

> The section provides a Congressional review mechanism, by which either the Senate or the House of Representatives may adopt a resolution of disapproval of any amendment proposed by the Commission under this section. The amendment will take effect only if not disapproved by either House of the Congress within 30 calendar days of continuous session after it has been submitted. If the amendment required by sec. 202(a) is disapproved, after six months the Commission may submit additional proposals. Authority to submit proposals extends for a 2-year period beginning at the time of the adoption of the first disapproval resolution.[12]

There was obviously great concern in the Conference as to just how far incremental pricing should go. There was agreement, as reflected in section 201, that there should be incremental pricing of gas used as boiler fuel. But beyond that there was no agreement. As set forth in the Conference Report, the Commission was required to *propose* an amending rule (Senator Jackson termed it a "plan", 124 Cong. Rec. S16261 (daily ed. September 27, 1978)), which was to take effect only if not vetoed by either house. Nowhere in the legislative history is there any indication that Congress agreed to a "mandatory" enlargement of section 201. Instead, the legislative history demonstrates that the plain meaning of the statute is correct: section 201 requires incremental pricing of boiler fuel but section 202 contemplates merely a proposal to be reviewed by Congress.[13] If either house disapproved

12. *Id.* at 95-97, U.S. Code Cong. Admin. News at 9012-13.

13. The floor debates offer convincing evidence. Senator Percy was concerned that incremental pricing -- an untried experiment -- would drive industrial users from natural gas to oil. To allay his fears, Senator Jackson, the chief Senate architect and sponsor of the Conference Report, explained in detail how the proposed pricing process would work, concluding with the statement that:

> this bill does not compel incremental pricing with respect to any industrial use other than in large boilers. Extension of incremental pricing beyond boiler use could be prevented by a majority vote of either House of Congress 2 years from now.

124 Cong. Rec. S15221 (daily ed. September 15, 1978), S16239 (daily ed. September 27, 1978).

Again, on September 27th Senator Jackson fully explained the tentative nature of the Phase II concept and the possible veto thereof as follows:

the proposal, there the matter rested. The Commission could, if it chose, submit a new proposal, but it was not obliged to do so; and in any case its authority to propose any further extension of incremental pricing would expire altogether 2 years after the initial disapproval.

2. **FERC Rules.** As required, the FERC promulgated Phase I regulations applying the incremental pricing surcharge to large industries using natural gas as boiler fuel. The regulations were issued on September 28, 1979 and became effective on January 1, 1980.[14] On November 15, 1979 the FERC issued a notice of proposed rulemaking for Phase II and asked for comments.[15] As found by the court below,[16] the FERC received many comments urging that incremental pricing not be expanded at all. FERC rejected these suggestions:

> The legislation requires boiler fuel users of natural gas to pay the increased costs of more natural gas supplies if the interstate pipeline's acquisition cost exceeds $1.48 per million Btu's plus inflation. This mechanism must be put in place within a year. The legislation also requires FERC to come up with a plan to provide a similar mechanism for other industrial users. This second phase will not go into effect if Congress disapproves.

124 Cong. Rec. S16261 (daily ed.).

Even Representative Dingell, a principal supporter of incremental pricing, recognized that Phase II was not mandatory, but rather was subject to congressional review and approval.

> The natural gas conference report will not drive industrial users off natural gas and onto other fuels. Such a result would be contrary to the very purposes of the bill's provisions.... If incremental pricing in fact drove industrial users to other fuels...the consumer protection aspects of incremental pricing would be impaired. The conferees have provided several statutory guarantees against such an unintended result.
>
> First, the mandatory requirements of incremental pricing [§ 201] apply only to boiler fuel users. Any broadening of incremental pricing to a broader universe of industrial users [§ 202] is subject to congressional review and single House veto.

124 Cong. Rec. H13114-15 (daily ed. October 14, 1978) (bracketed material added).

14. FERC Order No. 49, 44 Fed. Reg. 57726 (1979), codified at 18 C.F.R. §§ 154, 201, 204, 282 (1980).

15. Notice of Proposed Rulemaking and Public Hearings, FERC Docket No. RM80-10, 44 Fed. Reg. 67170 (1979).

16. App. at 12a.

> The Commission believes that it was neither requested nor authorized to second-guess the social and economic judgments that the Congress made in enacting Title II. The role of the Commission under Section 202 is more limited. ... It is up to the Congress to decide whether this Phase II submittal meets adequately the social and economic goals of the incremental pricing program or, indeed, whether those goals are still appropriate.
>
> By virtue of the very review procedures built into section 202, it seems clear that the Congress sought to have this Commission develop a meaningful Phase II rule. The Congress would not have a meaningful choice if the Commission were to offer no rule, or a very narrow rule, for its review. ...
>
> The Commission believes that this Phase II rule presents a meaningful choice to the Congress.[17]

3. **The House Veto.** The House Committee on Interstate and Foreign Commerce conducted hearings on the Phase II rule on April 3 and May 6, 1980. On May 6, the same day FERC issued the final rule, the Subcommittee on Energy and Power reported favorably on a resolution of disapproval, and the next day the full committee did the same.[18] In recommending disapproval of the rule, the Committee emphasized that energy market conditions had changed drastically and in unanticipated ways since passage of the NGPA. Furthermore, uncertainty about the value of incremental pricing remained because there had not yet been sufficient time to evaluate the effects of Phase I.[19] On May 20, 1980, the resolution of disapproval passed the House by a vote of 369-34.[20]

4. **FERC Rehearing Proceedings.** On June 5, 1980, CECA petitioned the FERC for rehearing. It asked the FERC to eliminate the provision making the Phase II rule conditional on the

17. App. at 125a.
18. App. at 111a.
19. App. at 114a.
20. H.R. Res. 655, 96th Cong., 2d Sess., 126 Cong. Rec. H3855 (daily ed. May 20, 1980). App. at 222a.

absence of a legislative veto, which CECA challenged as unconstitutional. On August 1, 1980, the FERC denied the petition, refused to pass judgment on the constitutional question, and revoked[21] the proposed rule, which in any event had not yet gone into effect.[22]

In its explanation of why the proposed rule had to be revoked, the FERC acknowledged that the legislative veto could be found invalid by a court, and therefore that, unless something was done to stop it, Order No. 80 might arguably have to be put into effect. The Commission expressly found that, absent congressional review, the amendment should not be placed in effect. Specifically, the Commission pointed out that it had made no independent evaluation of the social and economic goals of Phase II. The Commission determined that if Congress' consideration was not valid "then Order No. 80 cannot be the product of reasoned decision-making and the Commission is neither authorized nor required to place it in effect." App. at 199a.

The Commission noted further that, even in the absence of a thorough evaluation of the Phase II rule, "as an initial matter the Commission might well have very serious reservations as to the wisdom of making the Phase II rule effective." App. at 199a-200a. Because it determined that "major social and economic issues raised by Order No. 80, simply must be assessed, and a reasoned judgment reached on them, before the rule takes effect," App. at 201a, the Commission indicated that it did not desire to

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21. The use, by the Commission and others, of the term "revocation" to describe the Commission's action in rejecting the Phase II proposal is misleading. Inasmuch as a petition for rehearing had been filed, the rule was never administratively final and the Commission's authority to act in Docket No. RM80-10 had not expired. 15 U.S.C. 3416(a). Therefore, the Commission's action was more in the nature of a "withdrawal" of the proposed rule than a revocation of a final rule. Nonetheless, for convenience appellants will hereafter use the term adopted by the court and parties below.

22. Order No. 80 would, if not disapproved by either house, have gone into effect 90 days after expiration of the 30 legislative days provided for congressional review. Even if that 30 day review period is ignored, 90 days after May 6 would fall on August 4, 1980. Any other calculation results in a still later effective date.

place the Phase II amendment into effect on its own at that time.[23] Accordingly, the Commission revoked the amendments made by Order No. 80. App. at 201a, 203a.

CECA then sought rehearing of that portion of the Commission's order which revoked Order No. 80. In the second rehearing application, CECA claimed that the Commission lacked the power to revoke a rule "that a statute required it to issue" and that, in any event, the revocation was not in accordance with procedures for rulemaking specified in the Administrative Procedure Act, 5 U.S.C. § 553.

By order of October 2, 1980, the Commission denied rehearing on the revocation issue. App. at 204a-207a. It concluded that nothing in the NGPA prohibited the Commission's revocation of Order No. 80. The Commission also determined that the Administrative Procedure Act's notice and comment procedures did not require a different result, and in any event such procedures do not apply to regulations that never become operative and are clearly defective. App. at 207a.

Petitions for review were filed on September 26, 1980 (No. 80-2184) and October 24, 1980 (No. 80-2312). They were consolidated by order of the court of appeals on November 7, 1980.

5. **Opinion Below**. The Court of Appeals for the District of Columbia Circuit received briefs from the parties, intervenors, the United States as amicus curiae in support of CECA, and the House of Representatives and the Senate as amici curiae in support of the FERC. The court rejected the suggestion of Congressional amici that the case should be dismissed for want of

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23. Among other issues, the Commission determined that before placing the rule into effect it would be required to consider

> the possibility that fairly minimal savings to millions of high-priority users will be more than offset, in a broad social and political sense, by the significant surcharges and the increased costs of required reporting and accounting measures that would be imposed ... [and] whether the projected savings for high-priority users in annual gas costs might not be largely offset, in a strictly monetary sense, by increased prices for consumer goods possibly caused by passed-on Phase II incremental pricing surcharges.

App. at 200a-201a.

jurisdiction and instead brought in the district court as a mandamus action. App. at 17a-20a.[24] It then considered and rejected two threshold questions, severability and mootness, before turning to the constitutional question and deciding that the one-house veto was unconstitutional and ordering the FERC's Phase II rule into effect.

a. *Severability*. Intervenors and the FERC argued that the one-house veto provision was inseverable from the rest of Phase II, and accordingly that the court need not reach the constitutional question since no relief could be granted to CECA. The court disagreed.

The court noted that the NGPA contains no severability clause, but it declined to draw any conclusions from that fact. Instead, citing *United States* v. *Jackson*,[25] it held that "the question is whether Congress would have enacted the remainder of that statute without the unconstitutional provision." App. at 23a-24a. Not surprisingly, it found the Conference Report silent on that question. App. at 25a. The court then purported to find that the Conference Report's summary of all of Title II was silent about the one-house veto mechanism,[26] and also noted that no disapproval mechanism had been included in either the House or the Senate bill. These findings, the court concluded, "militate[ ] against the view that the veto provision was essential to the incremental pricing and NGPA compromises." *Id.*

The court next looked to the floor debates and though it found statements by Senator Jackson and Representative Dingell that Phase II was not mandatory and could be stopped by either house,

24. Congressional amici argued that CECA and other petitioners in essence were complaining not of the substance of the rule, a matter over which the court of appeals had jurisdiction, but that the FERC had not issued a rule it was required by statute to issue, a matter over which the district court had jurisdiction.

25. 390 U.S. 570, 585 n.27 (1968).

26. In support of this statement the court of appeals cites to a passage consisting of nine lines in the general introduction to the Conference Report, *supra* n.11, at 68-69, U.S. Code Cong. Admin. News at 8985. The court ignores the actual summary of Title II, as well as of sections 201 and 202, *see id.* at 94-97, U.S. Code Cong. Admin. News at 9010-13, which discuss the congressional review mechanism at some length; portions of this discussion are set forth *supra*, pp. 5-6.

it nonetheless remained convinced that the disapproval mechanism was not essential because these statements were "the sole references to subsection 202(c)" during the debate on incremental pricing. App. at 26a. Referring to a number of statements by supporters of the incremental pricing provisions, the court concluded that "[n]othing in these dozens of remarks remotely indicates that these proconsumer arguments would have changed into opposing arguments had Phase II not been made subject to legislative review." App. at 27a.

Finally, the court noted that although the scope of Phase I was not ambiguous (all large industrial boiler fuel users were included), the "exact contours" of Phase II were left in doubt, to be filled in by the FERC. The court thus reasoned that the statutory policy that recognized a distinction between Phase I and II would still be preserved even if the one-house veto was struck down.

b. *Mootness.* The court of appeals also rejected the contention that the constitutionality of the one-house veto had been rendered moot by the FERC's revocation of the Phase II rule, instead finding that the revocation was invalid because it was not accomplished in accordance with the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) and (c). App. at 31a. The court concluded that the action of the Commission in revoking the rule constituted a "repeal" of a rule, which must be the subject of a separate rulemaking proceeding, *see* App. at 33a, apparently even though the rule had never become effective.[27] The court similarly rejected the argument that requirements of notice and comment on the revocation of the Phase II rule were eliminated by the "good cause" exception contained in 5 U.S.C. § 553(b)(B). It found that the FERC had not, as required by that provision, delineated in the revocation order the basis for application of the "good cause" exception, and, in any event, the Commission's subsequent assertion that the rule had been revoked because it

27. *See* n.21, *supra*; pp. 19-21, *infra*.

was defectively promulgated did not constitute "good cause" for elimination of notice and opportunity to comment. App. at 35a-36a.

c. *Constitutionality*. The court of appeals held the one-house veto unconstitutional because it violates (1) the constitutional procedures for enactment of legislation and (2) the constitutional doctrine of separation of powers.[28]

1. The court refused to give effect to the House disapproval of the Phase II incremental pricing rule primarily on the basis that the veto violated the procedural requirements for legislation established by article I, section 7 of the Constitution, "both by preventing the President from exercising his veto power and by permitting legislative action by only one house of Congress." App. at 37a. The court of appeals found that the Phase II rule was promulgated by the FERC pursuant to a delegation of authority by Congress and as such was "binding and effective without action by either Congress or the President." App. at 77a.[29] The court explained that Congress had established in the NGPA a program of incremental pricing consisting of two phases, the first to take place immediately and the second, an expansion of the program, to take place several months later. The attempt by Congress to take a "second look" at what the court termed the "previously enacted policy," App. at 80a, of expanding incremental pricing under Phase II, could therefore only be accomplished through legislative action, action which under the

28. The court did not expressly reach an undue delegation of powers issue raised by CECA below. App. at 37a. *But see* App. at 78a-80a & n.172. It did, however, address and reject the contention that the dispute presented a political question that should not be subjected to interference by the court, App. at 43a-49a, finding instead that it "represents a clear disagreement between the political branches as to the meaning of the Constitution," making judicial resolution appropriate, App. at 49a. The court also rejected the contention that the Necessary and Proper Clause provided sufficient Constitutional authority for the veto device, App. at 50a-52a, explaining that that clause does not override other constitutional provisions and thus any authority exercised pursuant to that clause had to be consistent with constitutional procedures.

29. This finding is contrary to that of the FERC, *see* App. at 198a-199a, and to the clear intent of Congress as expressed in the statute and legislative history, *see* p. 26 *infra*.

Constitution requires the concurrence of both houses of Congress and participation by the President through his veto power. Otherwise, noted the court, "one house of Congress is enabled to enact a policy to which the other house and the President did not agree originally, a result that violates the requirements of Article I, Section 7." App. at 82a. Because the Phase II rule was intended to and could take effect without further action of Congress, reasoned the Court, the disapproval resolution constituted an attempt to effect a change in the law by a procedure not authorized by the Constitution and was thus invalid.

In reaching this conclusion, the court rejected the principal argument of intervenors and congressional amici that Congress had not taken a "second look" because it had never made a definitive policy decision to put Phase II of incremental pricing into effect, but instead had reserved that decision to itself in the disapproval mechanism of section 202(c). The court suggested that such a congressional reservation of the policy decision on expanding incremental pricing "would raise serious questions as to the validity of the Phase II delegation itself." App. at 78a.

2. The court also concluded that "the one-house veto contravenes the separation of powers principle implicit in articles I, II, and III because it authorizes the legislature to share powers properly exercised by the other two branches." App. 37a. The court found that the one-house veto established in section 202(c) infringed on powers of the Executive. It rejected the argument that rulemaking is a legislative function properly subject to congressional control. Instead, the court termed rulemaking an executive function of "administering and enforcing the public law," App. at 86a, and citing *Buckley* v. *Valeo*, 424 U.S. 1, 140-41 (1976), concluded that the FERC's status as an independent agency did not change the essentially executive function of that agency's rulemaking. App. at 88a-89a.

Finally, the court concluded that insofar as the one-house veto was justified as a means for Congress to prevent an agency from exceeding its statutory mandate, it unconstitutionally infringed on the judicial power of the courts. "The function of courts in

reviewing agency action is to interpret the statutory delegation and determine whether the administrative decision is in compliance with the delegation." App. at 101a. Assumption by one house of Congress of a standardless review of agency action unconstitutionally "diminishes the role of the Judiciary and expands that of Congress." App. at 102a-103a.

d. *Relief granted*. The court ordered the Phase II rule to take effect thirty days from the date of decision,[30] in order to provide the FERC an opportunity to amend the rule, or postpone its effective date for purposes of further consideration.

THE QUESTIONS ARE SUBSTANTIAL

The court of appeals has ordered into effect a rule that the House of Representatives has disapproved and that the expert agency charged with administration of the statutory scheme has disavowed. To do so the court had to ignore the plain language of the statute, mischaracterize the legislative history, treat a demonstrably correct revocation as a nullity, and frame the broadest possible constitutional theory -- all to hold unconstitutional a one-house disapproval resolution addressed to an independent agency and relating to a limited policy decision. Indeed, the court has sought to avoid any conclusion that would prevent it from reaching the constitutional question in this case.[31] Consequently, this case presents not only constitutional issues of the most fundamental nature about the allocation of power between the political branches, but more importantly, it raises serious threshold issues that should have rendered a determination of the constitutionality of the one-house veto unnecessary.

1. **Severability**. Had the court of appeals found the one-house veto inseverable from the remainder of section 202 it would not

30. By letter dated February 10, 1982, the clerk of the court of appeals notified all counsel that the thirty day delay would commence with issuance of the mandate in this case. Issuance of the mandate has been and continues to be stayed by orders of the court of appeals dated March 2, March 15, and March 25, 1982.

31. *See* App. at 21a n.47, 30a n.70, 36a-37a n.81, 44a-45a n.106, 47a.

have had to reach the constitutional question. Instead, it would have had to dismiss the case since if section 202(c) was constitutional, the House veto would be effective, and if unconstitutional, it and the remainder of section 202, including the authorization for the rule, would be invalid. Thus, regardless of the outcome, no relief could be granted. *McCorkle* v. *United States*, 559 F.2d 1258, 1261 (CA4 1977), *cert. denied*, 434 U.S. 1011 (1978).

The NGPA does not contain a severability clause. Unless such explicit expressions of congressional intent as to the severability of statutory provisions are to be ignored entirely, the noninclusion of a severability provision in the NGPA must be given some effect. *See Carter* v. *Carter Coal Co.*, 298 U.S. 238, 313 (1936) (absence of severability clause creates presumption of inseverability). Instead, in considering the severability issue the court of appeals essentially ignored the absence of a severability clause. While, as this Court has noted, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause," *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968), the failure of the court of appeals to give any consideration whatsoever to the absence of a severability clause serves only to highlight the court's equal failure to look to the clear statutory language for congressional intent as to severability.

Section 202 by its express terms forbids an extension of incremental pricing to non-boiler fuel industrial users if Congress disapproves. The operative language of subsection 202(a)[32] allows any such extension to "take effect only as provided under subsection (c)," which in turn allows the extension to take effect "unless ... either House of the Congress adopts a resolution of disapproval."[33] If such disapproval occurs, the proposed Phase II rule will not take effect, and the FERC may *not* implement another Phase II rule for at least six months and loses all power to

32. 15 U.S.C. § 3342(a).

33. *Id.* § 3342(c)(1).

implement Phase II after 2 years.[34] Notwithstanding this statutory language, which it does not discuss, the court holds that the disapproval mechanism was not essential and that even without it Congress would have adopted Phase II.

Having ignored the specific statutory language, the court finds the lack of extended discussion about the disapproval mechanism in the legislative history persuasive as to its unimportance. However, Congress has utilized the legislative veto mechanism for more than 50 years, *see* App. at 48a, as recognized by the court when it referred to the disapproval mechanism in this case as "a typical provision."[35] It is a procedure Congress has used in recent years to reach accommodation in specific factual circumstances where the issues involved are divisive. That the device occurs primarily in hotly controverted policy areas is obvious from even the most cursory listing of statutory examples.[36] Far from being unimportant, it oftentimes has been resorted to where accommodation is not otherwise possible.

Certainly that is the conclusion that the court should have reached in this case.[37] The court correctly notes that the House and Senate bills were radically different, that neither provided for legislative review, that it took 10 months for the Conference Committee to reach a compromise between the two and that the compromise included the legislative review provision. App. at 10a-11a.[38] At the very least these circumstances suggest that a

34. *Id.* § 3342(2)(B).

35. App. at 51a n.125.

36. *See, e.g.*, 50 U.S.C. § 1544 (War Powers Resolution); 2 U.S.C. § 438(d)(2) (Federal Election Campaign Act Amendments of 1979); 31 U.S.C. § 1403 (Congressional Budget and Impoundment Control Act of 1974); 5 U.S.C. § 5305 (Federal Pay Comparability Act of 1970).

37. *Compare* App. at 48a-49a n.120 *with* App. at 72a-73a n.166.

38. The court of appeals suggests that Phase II was important to the effectiveness of the incremental pricing program because Phase I was insufficient to obtain the desired effects, and thus the veto provision could not have been essential to the compromise. App. at 27a n.65. This premise is contradicted, however, by statements of Congressman Dingell, an ardent supporter of incremental pricing, supporting the idea that Phase I would be sufficient by itself to permit incremental pricing to achieve its objectives. 124 Cong. Rec. H13114-15 (daily ed. October 14, 1978); *see also* 126 Cong. Rec. E60 (daily ed. January 23, 1980)

court should exercise extreme caution before concluding that the textually operative language (the Phase II extension may take effect "only" as allowed by the clause requiring legislative review) is not essential and that Congress would have struck the same compromise without it.

Severability is particularly inappropriate here, where its consequence is the invalidation of a restriction on the discretion given the FERC. "[T]he case against severance is strong" where the provision restricts a grant of power; "[o]therwise, the scope of the power would be enlarged beyond the legislature's intent." *McCorkle* v. *United States*, *supra*. The court of appeals refused to follow this admonition, however, stating simply: "We decline to adopt this as a general principle [because it] would make all veto provisions prima facie inseverable." App. at 30a n.70. But there is no reason why that should not be the case, especially where, as here, the effect will be to expand enormously the mandate initially bestowed on the agency, by removing the intended control over its action through the congressional veto device.[39]

Judicial hesitance to expand authority delegated the Executive by Congress, through the severance of statutory limitations on such authority, does not rest on common sense alone; the very separation of powers principle cited by the court of appeals with regard to the one-house veto also constrains the court's authority

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(statement of Congressman Dingell at FERC hearings on Phase II rulemaking). The importance of an expansion of incremental pricing to other industrial users is also doubtful in light of section 206(d) of the NGPA, which, assuming the one-house veto it contains also to be unconstitutional, confers upon the FERC virtually unlimited discretion to exempt any or all users from incremental pricing. *See Ohio Ass'n of Comm. Action Agencies* v. *FERC*, 654 F.2d 811 (CA D.C. 1981).

39. Because the court has apparently held all of section 202(c) invalid, including the limits on FERC's power to implement Phase II after an initial disapproval, the FERC will presumably have the power to propose and implement new Phase II rules into the indefinite future. Thus the termination of the power of the FERC to propose a second Phase II rule two years after disapproval of the initial proposal by either house, 15 U.S.C. § 3342(c)(2)(B), has been written out of the statute. Even without the benefit of the reasoning in the *McCorkle* case, *supra*, it should be obvious that Congress intended no such result.

to order laws and regulations into effect without regard to limitations imposed by Congress. This constitutionally mandated caution is implicit in the *McCorkle* statement: "When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent." 559 F.2d at 1261.

Finally, severance is inappropriate here because of the breadth and vagueness of the delegation to the FERC in the absence of the congressional review mechanism. As discussed more fully below, the delegation of Phase II authority, as construed by the court of appeals, runs afoul of constitutional requirements for delegations of authority. Congress could hardly have intended to delegate unlimited discretion to the FERC with regard to incremental pricing, yet that is the result after severing congressional review provisions such as section 202(c). *Compare* section 202, 15 U.S.C. § 3342, *with* section 206(d), 15 U.S.C. § 3346(d).

2. **Mootness**. The court holds that FERC's order of August 1, 1980 revoking the proposed rule is invalid under sections 553(b) and (c) of the Administrative Procedure Act,[40] because the FERC failed to provide for notice and comment. In so doing, the court of appeals ignores the fact that at the time the Phase II rule was revoked,[41] the rulemaking proceeding had not yet become final and the "final rule" was not effective. Because the rule was not administratively final, there was no requirement or need for a separate rulemaking proceeding, with additional notice and comment, before refusing to put the proposal into effect.

FERC proposed the Phase II rule on November 15, 1979. During the next six months it received more than 400 written comments and held 5 public hearings. App. at 125a. Many parties filed comments urging that incremental pricing not be expanded at all. *See* App. at 12a. By its own admission FERC never considered the many comments urging either a modest

40. 5 U.S.C. § 553(b), (c).

41. Again, use of the term "revocation" in this context is misleading; the FERC action is more appropriately characterized as "withdrawal" of a proposed rule. See n.21, *supra*.

expansion or no further expansion at all of the Phase I program, App. at 198a, which plainly it would have to do in order to meet with reasoned decisionmaking requirements of the Administrative Procedure Act.[42] Instead, the FERC found that Congress had reserved that responsibility for itself, App. at 29a, and accordingly the FERC sent its proposal to Congress for review. When the House disapproved the proposed Phase II rule, CECA petitioned the FERC to put that unreasoned rule into effect on the ground that the disapproval mechanism was unconstitutional. This the FERC quite properly refused to do and, rather than leave the natural gas industry in a state of uncertainty, it removed the proposal from its books. Any other outcome, contrary to the court's statement, would indeed have "caught ... all parties, by surprise."[43] In short, the FERC concluded that if the House veto was constitutional no harm would be done by removing an ineffective proposal from the books; and if the House veto was unconstitutional the proposal had to be removed because the FERC "failed to exercise reasoned decisionmaking when it issued the rule."[44]

The court of appeals, however, stretched once again for a holding that would permit it to reach the constitutional issue concerning the one-house veto. It held that the Phase II proposal was a final rule when published on May 6, 1980, and thus could not be "repealed" without an opportunity for notice and comment by affected parties. App. at 33a & n.74.[45]

The key to the court's holding is its erroneous conclusion that the Phase II rule was final and therefore its repeal was subject to rulemaking procedures. *Id.* The court of appeals has confused "final rule" with "finality" of the administrative process, in this case rulemaking. Until such time as an agency can no longer

42. *See* 5 U.S.C. § 553(c).
43. App. at 35a n.76.
44. App. at 95a.
45. The court rejected the original notice and comment as encompassing the subsequent "repeal" of the rule, stating that such a conclusion would eviscerate the portion of section 551(5) of the Administrative Procedure Act that defines "rule making" to include "agency process for ... repealing a rule." 5 U.S.C. § 551(5). App. at 33a.

lawfully act in a proceeding, that proceeding is not final for administrative purposes, and the agency is free to act. That is particularly true here, where the governing statute provides that "upon the filing of an application for rehearing, the Commission may grant or deny the requested rehearing or *modify the original order without further hearing.*" 15 U.S.C. § 3416(a)(2) (emphasis added).[46] *Compare Florida Economic Advis. Comm.* v. *FPC*, 251 F.2d 643, 649 (CA D.C. 1957) (Burger, J.) ("The Natural Gas Act grants the Commission discretion to modify its orders without further hearings.") (footnote omitted) *with CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961) (agency cannot by use of reconsideration procedure avoid notice and hearing required by Federal Aviation Act.) Petitioners in the court of appeals requested rehearing of Order No. 80, thus rendering the Commission's Phase II rule non-final for administrative purposes until the FERC acted on its petition for rehearing. Under such circumstances, the Commission was well within its authority under the Administrative Procedure Act in revoking the Phase II rule.

The Commission's action in revoking the non-final Phase II rule is further supported by the recognition by the FERC itself that it had failed to exercise reasoned decisionmaking in promulgating the rule. App. at 95a, 199a. Faced with a defectively promulgated rule and the prospect that it could go into effect if the Commission simply denied the petition for rehearing, the FERC revoked, or more appropriately, withdrew the Phase II rule. There is no reason in law or policy for it to have done otherwise.[47]

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46. Although the Commission did not in its denial of rehearing expressly rely upon its authority under section 506, App. at 31a-32a n.71, that authority nonetheless does exist and supports the Commission's action here. *See Ecee, Inc.* v. *FERC*, 611 F.2d 554 (CA5 1980).

47. Indeed, policies of judicial economy and deference to administrative agencies support administrative resolution in a case such as this, where the agency recognizes and seeks to correct an obviously defective administrative decision. *See id.* at 565-66; *Pan American Petroleum Corp.* v. *FPC*, 322 F.2d 999, 1004 (CA D.C. 1963). Moreover, section 506(a) provides clear authority for Commission correction of its errors before full-scale judicial review. 15 U.S.C. § 3416(a)(2)-(4).

3. **Constitutionality**. The court of appeals should never have reached the constitutional question in this case. Its decision should be reversed for the reasons set forth in 1. and 2. above concerning the threshold issues of severability and mootness, thus avoiding an unnecessary constitutional ruling on an issue of major importance. If, however, this Court finds it appropriate to reach the merits it should uphold the constitutionality of the one-house veto in this case.

Particular attention must be paid to the unique circumstances surrounding the congressional disapproval mechanism involved here. Section 202(c) was the product of a ten-month effort by conferees of the House and Senate to report a bill on natural gas regulation. It accurately reflects congressional uncertainty concerning the scope of the previously untried incremental pricing of natural gas: limited Phase I incremental pricing was an experiment acceptable to Congress, but its expansion in Phase II to other, and possibly all, industrial users was not acceptable without further congressional approval through the mechanism provided in section 202(c). In addition, the disapproval mechanism established in section 202(c) has a limited life, *see* section 202(c)(2)(B), 15 U.S.C. § 3342 (c)(2)(B), and a specific purpose. Congress clearly designed it to be used only as a means for making the policy decision on expansion of incremental pricing; it was not designed as a means of continual congressional review over administrative actions. As such, it is substantially dissimilar from other congressional veto provisions, *see, e.g.*, section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2), and consequently it warrants a less stringent analysis.[48]

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48. *Chadha* v. *Immigration and Naturalization Service*, 634 F.2d 408, 424 (CA9 1980), *consideration of juris. postponed until hearing on merits*, 102 S.Ct. 87 (1981):

> An examination of the many instances in which strict separation [of powers] is not observed ... shows at one extreme a mere tinkering with the balance, of limited scope or temporal duration, growing out of a great practical necessity, and presenting a realistic threat neither to individual liberty nor to the orderly functioning of a coordinate branch.

The court of appeals held section 202(c) unconstitutional on two grounds: (1) because it violates article I, section 7 of the Constitution both by preventing the President from exercising his veto power and by permitting legislative action by only one house of Congress; and (2) because it contravenes the separation of powers principle implicit in articles I, II, and III by authorizing the legislature to share powers properly exercised by the other two branches. App. at 37a. The reasoning is in neither case correct.

a. The premise of the first ground is that the one-house veto in this case was the equivalent of legislation, and thus required a majority of both houses plus concurrence of the President or a supermajority of both houses. App. at 72a. The premise is incorrect. In establishing incremental pricing in Title II, Congress set up a two phase statutory scheme whereby in the first phase incremental pricing would be mandated as to industrial boiler fuel users, and in the second phase the FERC would propose an expansion of incremental pricing to other industrial users. The proposed expansion of the program would take effect only upon "action" by Congress. The necessary congressional "action", as defined by the Act, consisted of the failure of either house to pass a resolution of disapproval with respect to the Phase II proposal.[49] Pursuant to this limited delegation the FERC proposed an expansion of incremental pricing and, acting under the statutory scheme, one house rejected that expansion. Thus, all that happened was that a change in the law did not occur because the "action" by Congress necessary for such a change -- no resolution of disapproval by either house -- did not take place.[50]

49. *Cf.* 5 U.S.C. 551(13) ("agency action" defined to include failure to act); 16 U.S.C. § 825*l* (FERC inaction for 30 days on petition for rehearing under Federal Power Act deemed to constitute denial of rehearing, permitting judicial review); 15 U.S.C. § 3416(a)(2) (same for NGPA); *see also Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 143 (1939) (distinction between "negative" and "affirmative" orders of agency, as touchstone of jurisdiction for judicial review, serves no useful purpose).

50. For the Phase II proposal to have raised the constitutional difficulties discussed by the court of appeals, it would have been necessary for both houses of Congress *not* to have passed a resolution of disapproval. That "action" by Congress would, according to the terms of the statutory scheme, have caused the FERC Phase II rule to go into effect

b. The premise of the court's second ground is that the separation of powers principle has been contravened because the legislative branch has sought, by the one-house veto mechanism, to share in the powers of the executive and judicial branches. But no such sharing has occurred in this case. As discussed above, the disapproval of the Phase II proposal by the House of Representatives worked no change in the law, because Congress had never intended the expansion of incremental pricing to go into effect absent further congressional action. Without the predicate of legislation to be enforced or adjudicated, the powers of the executive and judicial branches are not called into play. In any event, the President's responsibility to "take Care that the Laws be faithfully executed" [51] has no applicability to laws entrusted to independent agencies. *See Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), and *Myers* v. *United States*, 272 U.S. 52 (1926). If the power and responsibility of the Executive are diminished by the fact of agency independence, that intrusion occurred decades ago and was upheld by this Court. *Humphrey's Executor, supra*. The real question is how the independent agency is to be controlled; as the court below correctly observed, the one-house veto "represents an attempt by Congress to retain direct control over delegated administrative power." App. at 97a.[52] Since the Executive has no say in rulemaking by

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as law, presumably without giving the President the opportunity to exercise his veto authority. *Clark* v. *Valeo*, 559 F.2d 642, 685-90 (CA D.C) (MacKinnon, J., dissenting), *aff'd mem. sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977); *see* App. at 78a-79a n.172 (a "conclusion that the Phase II rule [was to] have been a *new* policy that could take effect without affirmative approval by either house and without any presidential participation . . . would be . . . constitutionally dubious.").

51. Constitution, article II, section 3.

52. The court purports to find irony in the congressional perception of need for independence from the executive and need for having a politically accountable check on the agency's decision, App. at 89a, but the real irony is the court's holding that the Congress may not "share" in the purely legislative rulemaking process; according to the court only private parties outside of the government may share in the rulemaking process, not the legislative body ultimately responsible for making the rules. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939); *Currin* v. *Wallace*, 306 U.S. 1 (1939). *See* App. at 82a-83a n.182.

independent agencies, the one-house veto results in no aggrandizement of the legislature at the expense of the President, nor is there any sharing of power. Congress has simply declined to give away as much of its own power as it typically does where independent agencies are concerned. There is no rule in law or common sense that forbids a partial release where a complete release is permitted.[53]

Finally, to the extent congressional policy control over a rule proposed by the FERC, an independent agency, may interfere with undefined interests of the executive and judicial branches, any such interference here is quite limited in scope and in duration. Congress has restricted its authority to a simple approval or disapproval of proposals made by the FERC and has severely limited the time period in which such proposals can be made. Section 202(c)(2)(B), 15 U.S.C. § 3342(c)(2)(B). Under these circumstances, where the intrusion is minimal and not of a long-term routine nature, invalidation of part or all of the statutory scheme is unwarranted. *Chadha* v. *Immigration and Naturalization Service*, *supra* n.48, 634 F.2d at 424-25, 429.

4. **Delegation**. The court of appeals, by ordering the Phase II rule into effect, first had to find that the delegation to the FERC of the power to decide whether and how far to implement incremental pricing, without congressional review under section 202(c), was not unconstitutional. *See* App. at 76a-80a. The test for a permissible delegation is whether the Congress has performed "the essentials of the legislative function," which are "the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct."[54] The court of appeals aptly described the delegation problem in this case:

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53. The court of appeals' reliance on *Buckley* v. *Valeo*, 424 U.S. 1 (1976), is misplaced since, as it conceded, App. at 92a, that case turned on the express constitutional reservation of the appointment power to the President. No such reservation applies to this case, not even the "take Care" clause.

54. App. at 76a, *quoting Yakus* v. *United States*, 321 U.S. 414, 424 (1944) (Stone, C.J.).

> It unquestionably is true that Congress sought to avoid a definitive decision on extension of incremental pricing. But if, as [intervenors and congressional amici] suggest, Congress was utterly neutral on whether such extension should occur at all, then a serious question would arise whether the delegation could be effective at all, unless we were willing, as we are not, to accept the view that the existence of a legislative veto can serve to validate an otherwise too broad delegation.

App. at 78a n.172.

The court of appeals was correct when it stated that "Congress sought to avoid a definitive decision on incremental pricing." The FERC thought so as well,[55] *see* App. at 29a & n.69, as did the members of Congress who participated in the 1980 veto debates, *see* App. at 79a-80a. Yet, the court rejected this evidence and instead concluded that section 202 gave the FERC "discretion to issue [a Phase II] rule that would attain binding legal effect without further congressional action." App. at 79a. The court ignored the fact that congressional action was required by section 202 before the Phase II rule would attain "binding legal effect." That action, as expressly defined in section 202, was the failure of both houses of Congress to pass a resolution of disapproval within thirty legislative days. Until then, no definitive policy on Phase II was established, and since the benchmark for a valid delegation is whether the legislature has performed the function of determining "the legislative policy ... as a defined and binding rule of conduct," *Yakus* v. *United States*, *supra*, n.54, the delegation in this case must fail.[56]

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55. The FERC's interpretation of the scope of its authority is entitled to substantial deference. *EPA* v. *Nat'l Crushed Stone Ass'n*, ___ U.S. ___, 101 S.Ct. 295, 307 (1980).

56. The Ninth Circuit appears to have contemplated the situation presented here, but discusses it in the context of separation of powers and does not address the delegation problem:

> Although the practicality of alternatives to legislative disapproval in other situations raises difficult questions, we are not here faced with a situation in which the unforseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority *preclude the articulation of specific criteria in the governing statute itself.*

That conclusion is further reinforced by the exceptions provision in section 206(d) of the NGPA.[57] That provision bestows on the FERC the power to provide by rule or order for exemption from either Phase I or Phase II incremental pricing "in whole or in part, of any other incrementally priced industrial facility ..." subject to a congressional approval device identical to that provided in section 202(c). The statutory language "any other incrementally priced industrial facility" includes the entire universe encompassed by Phase I and Phase II pricing. The statute is devoid of any criteria or standard by which to measure such exemptions against legislative intent. If the court below is correct that the section 202(c) legislative veto device is unconstitutional and severable, so of course is the one applicable to the FERC's section 206 exemptions. Thus, the practical effect is to confer on the FERC sole and unlimited discretion to decide who will and who will not be subject to incremental pricing. If the delegation doctrine has any vitality whatsoever, it clearly forbids this type of unlimited delegation of congressional authority, for Congress has given the FERC no basis for determining where to draw the line on incremental pricing. *See Industrial Union Department* v. *American Petroleum Institute*, ___ U.S. ___, 100 S.Ct. 2844, 2878-87 (1980) (Rehnquist, J. concurring).[58] Under these circumstances the court of appeals correctly noted the "serious questions as to the validity of the Phase II delegation itself," App. at 78a, and should have invalidated the Phase II rule on that ground.[59]

Chadha v. *Immigration and Naturalization Service*, *supra* n.48, 634 F.2d at 432-33 (emphasis added) (footnotes omitted).

57. 15 U.S.C. § 3346(d).

58. *But see Ohio Ass'n of Comm. Action Agencies* v. *FERC*, *supra* n.40, 654 F.2d at 818 n.16.

59. The court of appeals also erred in ordering that the Phase II rule shall take effect without further action by the FERC. In so doing, the court denies appellants herein and other parties aggrieved by the Phase II rule an opportunity to seek Commission or judicial review of the substance of the rule. Because the House of Representatives vetoed the Phase II rule and the FERC subsequently revoked it, both actions occurring before the time for review had expired, there was no previous occasion for parties aggrieved by implementation of the rule to exercise their right of review. 15 U.S.C. §3416.

CONCLUSION

Probable jurisdiction should be noted in this case.

Respectfully submitted,

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May 1, 1982

APPENDIX

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, (including, where applicable, parents, other than wholly-owned subsidiaries, and affiliates):

ALABAMA-TENNESSEE NATURAL GAS COMPANY

ALGONQUIN GAS TRANSMISSION COMPANY

BLACK MARLIN PIPELINE COMPANY

CITIES SERVICE GAS COMPANY
CITIES SERVICE COMPANY

COLORADO INTERSTATE GAS COMPANY
THE COASTAL CORPORATION
CIG EXPLORATION, INC.

THE COLUMBIA GAS SYSTEM, INC.
BIG MARSH OIL COMPANY
ATLANTIC ENERGY, INC.

CONSOLIDATED GAS SUPPLY CORPORATION
CONSOLIDATED NATURAL GAS COMPANY

FLORIDA GAS TRANSMISSION COMPANY
CONTINENTAL RESOURCES COMPANY

EL PASO NATURAL GAS COMPANY
THE EL PASO COMPANY
DESERT AMERICAN INSURANCE AGENCY, INC. - VA.
EL PASO EUROPE - AFRIQUE, S.A.
GEONUCLEAR NOBEL PASO

ENSERCH CORPORATION

GREAT LAKES GAS TRANSMISSION COMPANY
AMERICAN NATURAL RESOURCES COMPANY
TRANSCANADA PIPELINE LIMITED

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.

LOCUST RIDGE GAS COMPANY

MICHIGAN GAS STORAGE COMPANY
CONSUMERS POWER COMPANY
NORTHERN MICHIGAN EXPLORATION COMPANY
PLATEAU RESOURCES, LIMITED
UTILITY SERVICES, INC.
MICHIGAN UTILITY COLLECTION SERVICE CO., INC.

MICHIGAN WISCONSIN PIPE LINE COMPANY
AMERICAN NATURAL RESOURCES COMPANY

MID LOUISIANA GAS COMPANY
CENTRAL LOUISIANA ENERGY CORPORATION

MISSISSIPPI RIVER TRANSMISSION CORPORATION
MISSOURI PACIFIC CORPORATION

MITCO PIPELINE COMPANY

NATURAL GAS PIPELINE COMPANY OF AMERICA
MIDCON CORP.

NORTHERN NATURAL GAS COMPANY

NORTHWEST PIPELINE COMPANY
NORTHWEST ENERGY COMPANY
PHILLIPS PACIFIC CHEMICAL COMPANY

PACIFIC GAS TRANSMISSION COMPANY
PACIFIC GAS AND ELECTRIC COMPANY
ALBERTA NATURAL GAS COMPANY, LTD.

PACIFIC INTERSTATE GAS TRANSMISSION COMPANY
PACIFIC INTERSTATE COMPANY
PACIFIC INTERSTATE OFFSHORE COMPANY
PACIFIC INTERSTATE TRANSMISSION COMPANY (ARCTIC)
PACIFIC INTERSTATE TRANSMISSION COMPANY (ROCKY MOUNTAIN)
PACIFIC OFFSHORE PIPELINE COMPANY

PANHANDLE EASTERN PIPE LINE COMPANY
PANHANDLE EASTERN CORPORATION
NATIONAL DISTILLERS AND CHEMICAL CORPORATION
NATIONAL HELIUM CORPORATION

RINGWOOD GATHERING COMPANY

SOUTHERN NATURAL GAS COMPANY
SONAT, INC.

TARPON TRANSMISSION COMPANY

TENNESSEE GAS TRANSMISSION CO.
TENNECO, INC.

TEXAS EASTERN TRANSMISSION CORPORATION
TEXAS EASTERN CORPORATION
TRANSWESTERN PIPELINE COMPANY

TEXAS GAS TRANSMISSION CORPORATION
AMCOM, INC.
AMERICAN CARRIERS, INC.
AMERICAN FREIGHT SYSTEM, INC.
ALL-AMERICAN REDEVELOPMENT CORPORATION
ATLANTIC TRANSPORT SERVICE, INC.
TRANSPORT BROKERAGE, INC.
M.C.T. SERVICES, INC.
MIDWEST COAST TRANSPORT, INC.
SIOUX FALLS SERVICE CENTER, INC.
AMERICAN COMMERCIAL BARGE LINE COMPANY
AMERICAN COMMERCIAL CREDIT CORPORATION
AMERICAN COMMERCIAL LEASING COMPANY
AMERICAN COMMERCIAL TERMINALS, INC.
BAUER DREDGING CO., INC.
COMMERCIAL BARGE LINE COMPANY
COMMERCIAL CARRIERS, INC. (MICHIGAN)
COMMERCIAL CARRIERS, INC. (ILLINOIS)
NATIONAL TRUCKING COMPANY
INLAND TUGS CO.
JEFFBOAT, INCORPORATED
LOUISIANA DOCK COMPANY, INC.
MAC TOWING COMPANY, INC.
WATERWAY COMMUNICATIONS SYSTEM, INC.
TEXAS GAS SYNFUEL CORPORATION
TXG RESOURCES, INC.
TEXAS GAS EXPLORATION (U.K.) CORPORATION
TEXAS GAS EXPLORATION (U.K.) LIMITED

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
TRANSCO COMPANIES, INC.
BORDER GAS, INC. (CLOSE CORPORATION)

UNITED GAS PIPE LINE COMPANY
UNITED ENERGY RESOURCES, INC.
SEA ROBIN PIPELINE COMPANY
HIGH ISLAND OFFSHORE SYSTEM
U-T OFFSHORE SYSTEM
NORTHERN BORDER PIPELINE COMPANY
ALASKAN NORTHWEST NATURAL GAS TRANSPORTATION COMPANY
TRANS-ANADARKO PIPELINE SYSTEM

VALERO ENERGY CORPORATION

VALLEY GAS TRANSMISSION, INC.

WESTERN TRANSMISSION CORPORATION

UNITED DISTRIBUTION COMPANIES (including, where applicable, parents, other than wholly-owned subsidiaries, and affiliates):

ASSOCIATED NATURAL GAS COMPANY
ARKANSAS POWER & LIGHT CO.
MIDDLE SOUTH UTILITIES, INC.

BATTLE CREEK GAS COMPANY

CENTRAL ILLINOIS LIGHT COMPANY

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY

CITIZENS GAS & COKE UTILITY
CITIZENS BY-PRODUCTS
COAL COMPANY

CITIZENS GAS FUEL COMPANY

CONSOLIDATED GAS SUPPLY CORPORATION

CONSUMERS POWER COMPANY

THE DAYTON POWER AND LIGHT COMPANY

THE EAST OHIO GAS COMPANY

EQUITABLE GAS COMPANY
KENTUCKY WEST VA. GAS COMPANY
KENTUCKY HYDROCARBON
KEPCO, INC.
PHILADELPHIA OIL COMPANY
BEREA GATHERING COMPANY
EQUITABLE GAS-ENERGY CO.

ILLINOIS POWER COMPANY

INDIANA GAS COMPANY

KOKOMO GAS AND FUEL COMPANY

MICHIGAN CONSOLIDATED GAS COMPANY
PRIMARK CORP.

MICHIGAN GAS UTILITIES COMPANY
MICHIGAN ENERGY RESOURCES CO.

MISSOURI UTILITIES COMPANY
UNION ELECTRIC CO.

NATIONAL FUEL GAS DISTRIBUTION CORPORATION
NATIONAL FUEL GAS CORP.
PENN-YORK ENERGY CORP.
SENECA RESOURCES CORP.
NATIONAL FUEL GAS SUPPLY CORP.

NIAGARA MOHAWK POWER CORPORATION
BEEBEE ISLAND CORP.
MOREAN MANUFACTURING CORP.

NORTH SHORE GAS COMPANY
PEOPLES ENERGY CORP.
THE PEOPLES GAS LIGHT & COKE CO.

OHIO GAS COMPANY

ORANGE & ROCKLAND UTILITIES, INC.

THE PEOPLES NATURAL GAS COMPANY

THE PEOPLES GAS LIGHT AND COKE COMPANY
PEOPLES ENERGY CORP.
NORTH SHORE GAS COMPANY

RICHMOND GAS CORPORATION

THE RIVER GAS COMPANY

ROCHESTER GAS & ELECTRIC CORPORATION

THE TOLEDO EDISON COMPANY

WEST OHIO GAS COMPANY

WISCONSIN FUEL & LIGHT COMPANY

WISCONSIN GAS COMPANY

WISCONSIN NATURAL GAS COMPANY
WISCONSIN ELECTRIC POWER CO.

Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Office - Supreme Court, U.S.
FILED
SEP 3 1982
ALEXANDER L. STEVAS,
CLERK

THE PROCESS GAS CONSUMERS GROUP, THE AMERICAN IRON AND STEEL INSTITUTE, AND THE GEORGIA INDUSTRIAL GAS GROUP,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, and PUBLIC CITIZEN, INC.,
Appellees.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA and UNITED DISTRIBUTION COMPANIES,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

PETROCHEMICAL ENERGY GROUP,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

AMERICAN GAS ASSOCIATION,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

UNITED STATES SENATE,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Respondents.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Respondents.

APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

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September 3, 1982

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PROCESS GAS CONSUMERS GROUP,
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AND THE GEORGIA INDUSTRIAL GAS GROUP,
Appellants,

v.

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CONSUMER FEDERATION OF AMERICA, and
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Appellees.*

INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA and
UNITED DISTRIBUTION COMPANIES,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
Appellees.

PETROCHEMICAL ENERGY GROUP,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
Appellees.

AMERICAN GAS ASSOCIATION,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
Appellees.

UNITED STATES SENATE,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
Respondents.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
Respondents.

APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

** There are no parent companies, subsidiaries, or affiliates of any of the appellees-respondents.*

MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

STATEMENT OF THE CASE

A. Statement of Facts

On May 6, 1980, the Federal Energy Regulatory Commission ("FERC" or the "Commission"), acting pursuant to section 202(a) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(a) (the "NGPA"), issued a regulation which is referred to as the Phase II incremental pricing rule. 5a. The purpose of the rule, which FERC was expressly required by statute to issue by May 9, 1980, was to shift some of the price increase resulting from the phased deregulation of natural gas from residential to industrial users. *Id.* On May 7, 1980, the Committee on Interstate and Foreign Commerce of the House of Representatives disapproved the rule, and on May 20, the House of Representatives, pursuant to section 202(c) of the NGPA, overwhelmingly voted to veto the rule to prevent it from going into effect. *Id.*

On June 5, 1980, acting pursuant to the requirements of 18 C.F.R. § 286.102 and 15 U.S.C. § 3416(a)(4), appellees-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (the "Consumer Groups") petitioned FERC for rehearing on the ground that the House's veto was unconstitutional and therefore of no effect. 197a. They requested that the Commission delete the portion of its May 6 order which made its effectiveness conditional upon the failure of either House of Congress to veto the rule. On

August 1, 1980, the Commission denied the petition. Although recognizing that significant constitutional questions were raised by the veto, it declined to take sides on the merits. 197a-198a. But instead of leaving the matter in that posture, so that the Consumer Groups could have plainly sought judicial review of the denial and obtained a ruling on the veto's constitutionality, the Commission purported to revoke the rule, allegedly in order to rid the public of some ill-defined uncertainty but, quite obviously, in an effort to prevent the Consumer Groups from challenging the legality of the veto in court. 199a-203a.

In response, the Consumer Groups sought rehearing of the portion of the order which purported to revoke the May 6 rule. 205a. On October 2, 1980, that second petition for rehearing was denied. 204a-207a. Petitions for review were filed in the United States Court of Appeals for the District of Columbia Circuit with respect to both the August 1 and October 2 denials, and they were ordered consolidated. 6a.

Intervention was granted various industry groups whose members would have had to pay increased prices for natural gas if the incremental pricing rule went into effect, and the intervenors have appealed the decision of the D.C. Circuit to this Court (Nos. 81-2008, 81-2020, 81-2151, and 81-2171). In the Court of Appeals, FERC limited its arguments to a defense of the revocation of the rule and to its claim that the veto was not severable from the remainder of the statute authorizing incremental pricing. 6a. It has not, however, filed for review in this Court. In addition, the Executive Branch, appearing through the Department of Justice, appeared as an *amicus curiae* below, supporting the constitutional challenge to the veto, and the Senate and House of Representatives filed an *amicus* brief both urging the court not to reach the veto question and

defending the veto on its merits. *Id.* After the decision was issued, all three governmental parties were granted leave to intervene, and the Senate and House have filed petitions for writs of certiorari (Nos. 82-177 and 82-209).

B. The Decision Below

No one disputes that the constitutionality of the veto of the Phase II incremental pricing rules presents a constitutional issue of great importance to the Executive Branch, the Congress, and the public. Nonetheless, all of the parties opposing the Consumer Groups in this action have made every effort to have the Court of Appeals and this Court avoid reaching it, with their principal focus on two arguments. First, they contend that, because of the Commission's August 1 revocation order, there is no incremental pricing rule that could go into effect even if the veto is held unconstitutional, and therefore the case is moot. Second, they argue that the provision containing the veto, section 202(c), is not severable from the provision authorizing the issuance of the Phase II rule itself, section 202(a), and thus, if the veto is unconstitutional, there is no authority to issue any rule, and hence the Consumer Groups could not benefit from a declaration that the veto is unconstitutional.[1]

The Court of Appeals in a unanimous opinion rejected both of these arguments. As to the revocation, it agreed with the Consumer Groups that FERC had violated the Administrative Procedure Act, 5 U.S.C. § 553, by failing

[1] In the Court of Appeals, the House and Senate argued that the court did not have jurisdiction, alleging that the constitutional challenge should have been brought in the District Court. That position was rejected by the court below, 17a-20a, and it has not been pursued in this Court. In addition, the Senate and House claimed that the case involved a political question, but the Court of Appeals also rejected that contention. 43a-50a.

to provide notice and an opportunity for public comment before revoking the Phase II rule. 31a-36a. In so ruling, the court found that the prior notice given with respect to the proposed incremental pricing rule was inadequate to cover the revocation, 32a-33a, and that the Commission lacked good cause for failing to provide for public comment. 35a-36a. Accordingly, it concluded that the revocation was void, and thus it did not have to reach the alternative argument made by the Consumer Groups that, due to the mandatory nature of the Phase II requirement imposed by section 202, FERC lacked the power to revoke the Phase II rule in its entirety. 31a.

The Commission also rejected the claim of nonseverability. Applying the test urged on it by all parties, as enunciated by this Court in *Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932), *quoted with approval in Buckley v. Valeo,* 424 U.S. 1, 108-109 (1976), 23a, the court found that if Congress had known that it could not have included a veto provision, it would still have required FERC to issue Phase II incremental pricing rules. 28a. The court did so based upon its detailed review of the legislative history of the NGPA and in particular the central role which both Houses assigned to incremental pricing as part of the compromise to reduce the price increases to residential users resulting from the NGPA's phased price deregulation. 24a-27a. By concluding that the veto was severable, the court avoided reaching the alternative argument made by the Consumer Groups that, if the veto were not severable, the incremental pricing authority was also not severable from phased deregulation. 21a-22a. In that event, the natural gas pricing laws would revert to what they were before the NGPA, which would mean greater price controls and hence lower prices for residential users.

On the merits, the Court of Appeals examined the debate surrounding the veto and found that the veto was predominantly legislative in character, since many members expressed the view in 1980 that they were simply taking a second look at what they did in 1978 and were using the veto to alter that prior policy determination. 79a-80a. The court found that, as a legislative act, the veto was unconstitutional because it did not comply with the lawmaking requirements of Article I, Section 7 of the Constitution, which mandate affirmative approval by two Houses of Congress and presentment to the President for either his signature or a veto. The court addressed at length the principal arguments advanced by the Congressional *amici* based on their expansive reading of the Necessary and Proper Clause of the Constitution – that the veto was similar to other actions properly taken by a single House, and that the rule sent to Congress was merely a proposal that, like any other Executive proposal which failed passage of both Houses, did not become law. As to the former, the court found that in some cases the actions were not similar to the veto and in others there was doubt as to the constitutionality of the actions relied on. 55a-64a. The court also rejected the characterization of the rule as a proposal and noted that Congress can act only through positive action, not by inaction. 74a-77a.

The court also examined the veto from a separation of powers perspective and found that it was unconstitutional under that analysis as well. 84a-103a. Thus, if the House were attempting to control, or share with FERC, the responsibility for administering the incremental pricing rules, it was acting unconstitutionally in performing an Executive function. 90a-99a. Similarly, if the House were interpreting the NGPA, and had concluded that the rule was not proper under it, it would have been overstepping its constitutional role by undertaking a function reserved

exclusively for the Judiciary. 100a-103a. Therefore, the Court concluded, regardless of whether the veto was seen as a Legislative, Executive or Judicial act, it was unconstitutional.[2]

Finally, the court turned to the question of relief. As the Consumer Groups recognized, the veto had deprived the industry parties, who would be adversely affected by the rule, of their opportunity to petition for rehearing or seek judicial review of the rule. In addition, the Consumer Groups acknowledged that, by the time the case is finally concluded, there may well be changed circumstances requiring a different rule from the one considered appropriate in 1980. Accordingly, they advised the court that they would not object if, upon remand, the Commission temporarily stayed the rule to allow for reconsideration in light of the then existing circumstances. In response, the Court of Appeals directed that its order invalidating the veto be stayed for 30 days after issuance of the mandate to permit the Commission to take whatever action it deemed appropriate at that time. 104a. As a result of subsequent orders of the Court of Appeals, and the filing of the jurisdictional statements and petitions for writs of certiorari in this Court, no further action has been taken by FERC, and the order below remains stayed.

---

[2]Because of these rulings the Court of Appeals did not reach the alternative argument made by the Consumer Groups based on the doctrine of undue delegation. 37a & note 82.

THIS COURT SHOULD LIMIT ITS REVIEW TO THE QUESTION OF THE CONSTITUTIONALITY OF THE VETO.

The four jurisdictional statements and two petitions for writs of certiorari present twenty-five questions for review. Even taking into account the overlaps between them, there are at least ten different issues raised. In addition, there are also alternative grounds for the rulings on revocation and severability, which were raised by the Consumer Groups below, but not reached by the Court of Appeals.

Since the Court of Appeals found section 202(c) of the NGPA to be unconstitutional, the case is properly here on appeal pursuant to 28 U.S.C. § 1252, although for reasons unstated in their papers, the Senate and House of Representatives have filed petitions for writs of certiorari. In any event, the sole basis for the appeal, and the only question worthy of plenary consideration by this Court, is the constitutionality of section 202(c) and the ensuing veto. While the Consumer Groups believe that a decision on the constitutionality of the legislative veto which is at issue in *Immigration and Naturalization Service v. Chadha,* (Nos. 80-1832, 80-2170 and 80-2171), would be dispositive of the constitutional question presented here, since the Court has ordered reargument in *Chadha,* consideration of the constitutional question in this context may aid the Court in its resolution of the issue presented there. Therefore, since an appeal from the declaration of unconstitutionality is properly before this Court, we do not object to plenary review of that issue.[3]

[3]Counsel for the Consumer Groups here also represent Mr. Chadha in his case, and all of the other parties in *Chadha* are also represented by the same counsel here. The only additional parties in this case are the four groups of industry appellants, only two of whom – the Interstate Natural Gas Association of America/United Distribution Companies and the American Gas Association – have presented the constitutional question in their jurisdictional statements.

None of the myriad of other issues presented deserves this Court's consideration. Several of the issues, such as political question, standing, and severability, are fully presented in *Chadha*. Whatever rulings need to be made by the Court on those questions can be done in that case and then simply applied here. The other principal questions involve the interpretation of the Administrative Procedure Act and were correctly decided below. *See also Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency,* _____ F.2d_____, (No. 81-2068) (3d Cir., July 8, 1982). Moreover, they present no significant issues for the Court, as evidenced by the fact that the Commission has not asked for further review of them even though it was entitled to do so as of right. Finally, the problem of relief, which is the only real concern of the industry appellants, is adequately resolved by the opportunity that the Commission has to consider the matter further on remand.[4]

[4]Of the remaining issues raised in the various filings, several seem to be directed to the validity of the underlying Phase II rule (question 4 of the Interstate Natural Gas Association, question 5 of the American Gas Association, and question 3 of the Petrochemical Energy Group). These questions are not at issue in this case, nor were they raised below. Others are related to this case, but were not adequately presented below, and therefore should not be considered by this Court (questions 3 and 5 of the House of Representatives and question 1 of the American Gas Association).

CONCLUSION

For the foregoing reasons, this Court should grant plenary consideration limited solely to the question of the constitutionality of the legislative veto issued pursuant to section 202(c) of the Natural Gas Policy Act.

Respectfully submitted,

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September 3, 1982

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CLERK

Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

In the Supreme Court of the United States

OCTOBER TERM, 1982

PROCESS GAS CONSUMERS GROUP, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

PETROCHEMICAL ENERGY GROUP, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

AMERICAN GAS ASSOCIATION, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES SENATE, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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QUESTION PRESENTED

The United States will address the following question:

Whether Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3342(c), which authorizes one House of Congress to pass a resolution disapproving a rule adopted by the Federal Energy Regulatory Commission concerning the incremental pricing of natural gas, is unconstitutional because it contravenes the procedures established in Article I of the Constitution for the exercise of legislative power or because it violates the principle of separation of powers.

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p. H3311 (daily ed. May 6, 1980) 5
pp. H3839-H3855 (daily ed. May 20, 1980) 5
p. H3855 (daily ed. May 20, 1980) 5

44 Fed. Reg. (1979):
p. 57726 5
p. 67170 5

H.R. Rep. No. 96-938, 96th Cong., 2d Sess. (1980) 5
H.R. Res. 655, 96th Cong., 2d Sess. (1980) 5
R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 21

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2008

PROCESS GAS CONSUMERS GROUP, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 81-2020

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 81-2151

PETROCHEMICAL ENERGY GROUP, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 81-2171

AMERICAN GAS ASSOCIATION, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 82-177

UNITED STATES SENATE, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 82-209

UNITED STATES HOUSE OF REPRESENTATIVES,
PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.S. App. 1a-104a)[1] is reported at 673 F.2d 425.

JURISDICTION

The jurisdiction of the court of appeals was invoked under 15 U.S.C. (Supp. IV) 3416(a)(4) (J.S. App. 17a-20a). The judgment of the court of appeals was entered on January 29, 1982 (J.S. App. 208a-209a). The order of the court of appeals granting the motions of the United States House of Representatives, the United States Senate, and the United States for leave to intervene was entered on March 2, 1982 (J.S. App. 105a). A petition for rehearing was denied on March 10, 1982 (J.S. App. 210a). The notices of appeal in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 were filed on March 15, 17,

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 81-2008.

25 and 26, 1982, respectively (J.S. App. 213a, 215a, 217a, 220a),[2] and the jurisdictional statements were filed on April 29 and May 1, 21 and 24, respectively. On May 26, 1982, the Chief Justice granted the House of Representatives and the Senate an extension of time, to and including August 7, 1982, within which to file a petition for a writ of certiorari. The petition in No. 82-177 was filed by the Senate on August 2, 1982, and the petition in No. 82-209 was filed by the House of Representatives on August 6, 1982. The jurisdiction of this Court in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 is invoked under 28 U.S.C. 1252, and the jurisdiction of this Court in Nos. 82-177 and 82-209 is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Pertinent provisions of Articles I, II and III of the United States Constitution are reproduced at J.S. App. 222a-224a.

2. Sections 201, 202, 206(d) and 506 of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3341, 3342, 3346(d) and 3416, are reproduced at J.S. App. 224a-231a.

STATEMENT

1. Title I of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, provides for the phased deregulation of natural gas prices. Title II provides for a system of incremental pricing to "eas[e] the transition to deregulation" (J.S. App. 7a). Incremental pricing is a mechanism for passing

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[2] The Federal Energy Regulatory Commission also filed a notice of appeal, on March 25, 1982 (J.S. App. 219a), but it did not thereafter file a jurisdictional statement.

through to certain industrial users some of the increased price for natural gas resulting from phased deregulation, up to a level established by the cost of alternative fuels. It was designed to protect residential consumers against higher prices resulting from deregulation and to furnish some restraint on the prices paid by pipelines for natural gas supplies, particularly after deregulation, because large industrial users were expected to be especially price sensitive (*id.* at 7a-8a).

Under Title II of the Act, the implementation of incremental pricing is to occur in two phases. Section 201 of the Act, 15 U.S.C. (Supp. IV) 3341, directs the Federal Energy Regulatory Commission (FERC), within 12 months of the enactment date of the Act, to prescribe a rule providing for incremental pricing for the boiler fuel use of natural gas by any industrial boiler fuel facility. To implement Phase II, Section 202(a) of the Act, 15 U.S.C. (Supp. IV) 3342(a), in turn directs the Commission to prescribe an amendment to the Phase I rule, extending the rule generally to other industrial users of natural gas, not later than 18 months after the enactment date of the Act.

Under Section 202(c) of the Act, 15 U.S.C. (Supp. IV) 3342(c), the Phase II rule adopted pursuant to Section 202 must be submitted to each House of Congress. Section 202(c) provides that, following submission, the amendment "shall take effect" at the end of 30 calendar days of continuous session of Congress "unless, during such 30 day period * * * either House of the Congress adopts a resolution of disapproval * * * with respect to such amendment."

2. As required by Section 201, the Commission published a rule in October 1979 applying incremental pricing to industrial boiler fuel facilities.

44 Fed. Reg. 57726. On November 15, 1979, the Commission published a notice of proposed rulemaking for a Phase II rule extending incremental pricing to all industrial users of natural gas not specifically exempted under the Act. 44 Fed. Reg. 67170. On May 6, 1980, the Commission issued final Phase II regulations based on the notice issued the previous November (J.S. App. 12a, 123a-195a).

On the same day that the Commission adopted the Phase II rule, a resolution of disapproval (H.R. Res. 655, 96th Cong., 2d Sess. (1980); J.S. App. 222a) was introduced in the House of Representatives and referred to the House Committee on Interstate and Foreign Commerce. See 126 Cong. Rec. H3311 (daily ed. May 6, 1980). The relevant Subcommittee approved the resolution by voice vote that same day, and the full Committee did likewise on May 7, 1980. See H.R. Rep. No. 96-938, 96th Cong., 2d Sess. 5 (1980). In its report to the full House, dated May 12, 1980, the Committee explained its position by noting that conditions in the energy market and in the economy had changed considerably since the Act was passed in 1978 and that there had not yet been sufficient experience with incremental pricing under Phase I (*id.* at 8-9, 13-14). The Committee also took issue with what it characterized as the Commission's narrow interpretation of its authority under Section 204(e) of the Act, 15 U.S.C. (Supp. IV) 3344(e), to establish the alternative fuel cost. H.R. Rep. No. 96-938, *supra*, at 10-11. Comments during floor debate on the resolution echoed the Committee report's main themes. See 126 Cong. Rec. H3839-H3855 (daily ed. May 20, 1980); J.S. App. 14a-15a. On May 20, 1980, the resolution of disapproval passed the House by a vote of 369 to 34 (*id.* at 15a; 126 Cong. Rec. H3855 (daily ed. May 20, 1980)).

3. a. After passage of the resolution of disapproval, appellee-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (collectively referred to herein as CECA) petitioned the Commission for rehearing. CECA sought an order making the Phase II rule effective, contending that the one-House veto provision in Section 202(c) of the Act is unconstitutional and that the resolution of disapproval passed by the House pursuant to that section therefore was of no legal effect (J.S. App. 15a).

By order dated August 1, 1980, the Commission denied the petition for rehearing and instead revoked the Phase II rule (J.S. App. 196a-203a). The Commission declined to pass upon the constitutionality of Section 202(c), stating that "sound administrative practice requires the presumption of constitutional validity of the statutes entrusted to this Commission for implementation" (J.S. App. 198a). The Commission noted, however, that an argument could be made that if the legislative veto provision in Section 202(c) were held invalid by a court, the Phase II rule would take effect. The Commission stated that it "ha[d] not yet independently evaluated whether the Phase II rule meets the social and economic goals of the Title II incremental pricing program" (J.S. App. 199a) and explained that it was revoking the rule to permit it to make such an evaluation (*ibid.*).

b. CECA petitioned for rehearing of the revocation order, asserting that the Commission had no substantive authority to revoke the Phase II rule and that, in any event, the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553, should have been followed (J.S. App. 16a). The Com-

mission denied the petition for rehearing by order dated October 2, 1980, concluding that Sections 201 and 202 of the Act empowered it to revoke the rule and that notice and comment requirements had been satisfied by the original notice of proposed rulemaking published on November 15, 1979 (J.S. App. 204a-207a). In the alternative, the Commission stated that there was "good cause" for dispensing with further notice and comment procedures (*id.* at 206a-207a, citing 5 U.S.C. 553(b)).

4. CECA then filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking review of the Commission's orders of August 1 and October 2, 1980 (J.S. App. 16a), again contending that Section 202(c) of the Act is unconstitutional. The United States Senate and House of Representatives appeared as amici curiae supporting the constitutionality of Section 202(c), and the United States appeared as amicus curiae arguing that the legislative veto provision is unconstitutional. FERC did not take a position on the constitutional question.

a. As an initial matter, the court disposed of a number of subsidiary issues raised by the House and Senate and by FERC: [3]

First, the court rejected the argument that it was unnecessary to decide the constitutional question because the legislative veto provision in Section 202(c) of the Act is not severable from the authorization in Section 202(a) and (b) for the promulgation of a

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[3] In addition to the issues discussed in the text, the court rejected the arguments that the court of appeals did not have statutory jurisdiction of the case under 15 U.S.C. (Supp. IV) 3416 (J.S. App. 17a-20a) and that the constitutionality of the legislative veto presents a non-justiciable political question (*id.* at 43a-49a).

Phase II rule and that petitioners therefore were not in any event entitled to effective relief (J.S. App. 21a-30a). The court concluded, after reviewing the legislative history, that Congress would have enacted Phase II of the incremental pricing mechanism without the legislative veto device and that Section 202(c) thus was severable from the statutory authorization in Section 202(a) and (b) for issuance of a Phase II rule (J.S. App. 24a-30a). The court noted in this regard that the legislative veto provision was not contained in the incremental pricing bills passed by either House. Instead, the court observed, the veto provision was added by the conference committee, which failed even to mention, much less emphasize, this feature in the portion of its report that summarized Title II of the Act. This history, the court explained, "militates against the view that the veto provision was essential to the incremental pricing and [Natural Gas Policy Act] compromises" (*id.* at 25a).

The court of appeals also held that the case was not moot by virtue of FERC's attempted revocation of the Phase II rule, finding that FERC had failed to provide the notice and opportunity for comment required by the APA in order for the revocation to become effective (J.S. App. 31a-34a). The court rejected the Commission's contention that the opportunity for notice and comment provided in connection with the initial promulgation of the Phase II rule was sufficient to cover the order of revocation because one of FERC's options at the outset was to adopt no Phase II rule at all. The court noted that the APA defines the term "rule making" to include the process for repeal as well as adoption of a rule (5 U.S.C. 551(5)) and reasoned that this definition would have been unnecessary if notice and comment prior to adoption of a rule were

sufficient to encompass later repeal. In addition, the court remarked that the issues involved in the revocation decision—the constitutionality of the legislative veto and the consequenecs that might follow from a judicial decision—were different from those raised in the initial rulemaking proceeding (J.S. App. 32a-34a).

The court of appeals rejected the contention that FERC had "good cause," within the meaning of 5 U.S.C. 553(b)(B), to dispense with notice and comment procedures. The court observed that FERC had merely asserted that notice and comment were "unnecessary," without stating its reasons in the revocation order itself, as explicitly required by 5 U.S.C. 553(b)(B), and held that in any event no emergency existed warranting FERC's decision not to afford the public an opportunity to participate (J.S. App. 35a-36a).

b. On the merits, the court of appeals held unconstitutional the legislative veto provision in Section 202(c) of the Act for two independent reasons. First, it held that the authorization for one House of Congress to adopt a resolution disapproving a rule promulgated pursuant to an Act of Congress violates the explicit requirements of Article I, Sections 1 and 7 of the Constitution, which the court described as establishing the "fundamental prerequisites to the enactment of federal laws" (J.S. App. 55a).

The court read the debates of the Constitutional Convention and the *Federalist* papers to reflect a concern on the part of the Framers to protect against improvident and encroaching action by the Legislative Branch and the possibility that majorities in the National Legislature might exercise unconstrained power that could destroy the power of the States. In the court's view, the Great Compromise, dividing the Con-

gress into two Branches, one representing the people and the other the States, served to guard against the latter eventuality, and the requirement of concurrent action by these two differently constituted bodies served as a check against the former (J.S. App. 70a-71a). Similarly, the court held that the provision for presentation of all legislative measures to the President for his approval or disapproval was intended by the Framers to be a "defensive weapon against legislative intrusions on the powers of the Executive" (*id.* at 64a) and a "check against ill-advised legislation" (*id.* at 65a). These important purposes underlying the procedural requirements for the exercise of power by the Legislative Branch required rejection of the suggestion that a legislative veto of agency action is exempt from those requirements.

The court "emphatically reject[ed]" the argument that the Phase II rule never had legal effect in the first place but rather was merely a "proposal" that could be rejected by one House of Congress without compliance with the bicameralism and presentation requirements. The court observed that the one-House veto "effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect" (J.S. App. 74a). The court noted that a rule which is not disapproved does not die, as does a bill that fails to pass both Houses of Congress; rather, such a rule has legal force as the product of a valid authorization conferred on an agency by an Act of Congress (*id.* at 74a-79a). To render invalid a rule issued pursuant to such authorization, the court concluded, requires adherence to the "same procedure" followed in conferring the authorization in the first place, that is, concurrence of both Houses of Congress and presentation to the President for approval or veto (*id.* at 80a). Con-

versely, the court stated that "[i]f Congress had wanted FERC merely to propose an extension of incremental pricing to be accepted or rejected by Congress, it could have so provided" (*id.* at 74a-75a).

The court of appeals also held that the legislative veto violates the constitutional doctrine of separation of powers (J.S. App. 84a-103a). The court noted that this Court held in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that the issuance of regulations represents the performance of a significant governmental duty pursuant to public law and therefore must be exercised by "Officers of the United States" appointed either by the President or as otherwise provided by the Appointments Clause (Article II, Section 2, Clause 2), not by officers appointed by Congress (J.S. App. 91a, quoting 424 U.S. at 140-141). In the court of appeals' view, it followed a fortiori from this holding that Congress itself likewise is prohibited from interfering in the rulemaking process, for "[i]t would be anomalous in the extreme to hold that Congress may not appoint the officials who make rules, but may enact a mechanism permitting effective congressional control over these officials' decisions" (J.S. App. 92a-93a).

The court rejected the suggestion that the Commission's status as an "independent agency" alters the separation of powers analysis (J.S. App. 88a-90a). The court noted that the status of the Federal Election Commission as an independent agency did not prevent this Court in *Buckley* from employing the separation of powers doctrine as the basis for reviewing the constitutionality of the statute establishing the Commission. The court recognized that the President "does not have a claim to control the decisionmaking of independent agencies" (*id.* at 89a). But the court found it to be "an enormous, and unwarranted, jump from this to the conclusion that Congress may itself

interfere with an independent agency's decisions without regard to separation of powers. Although FERC is substantially independent of the Executive, it nonetheless performs executive functions" (*ibid*).

c. In view of its decision on the merits, and its holding that FERC had not validly revoked the rule, the court of appeals concluded that the rule should go into effect. However, the court granted a stay of the effective date to permit the Commission an opportunity to reconsider the rule (J.S. App. 104a). After the court entered its judgment, the Senate, House of Representatives, and the United States were granted leave to intervene (*id.* at 105a).

DISCUSSION

Like the Ninth Circuit in *INS* v. *Chadha*, No. 80-1832, the court of appeals in this case has held unconstitutional a provision in an Act of Congress authorizing one House of Congress to adopt a resolution, without the concurrence of the other House or presentation to the President, that nullifies an order issued by a federal agency pursuant to its statutory mandate. The constitutionality of the legislative veto device presents an issue of the most fundamental nature regarding the distribution of powers among the coordinate branches of the federal government and the manner in which those powers may be exercised. That issue manifestly warrants, and already has been granted, plenary review by this Court. *INS* v. *Chadha* was fully briefed and argued last Term, and it has been set for reargument this Term. The same constitutional principles that govern *Chadha* govern this case as well, and the Court's decision in *Chadha* will, we believe, control here.

To be sure, this case involves a legislative veto of a rule, not an order entered at the completion of an

adjudicatory process, as in *Chadha*. In addition, the Officers of the United States responsible for promulgation of the rule in this case—the members of the Federal Energy Regulatory Commission—may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office (42 U.S.C. (Supp. IV) 7171(b)); they are not subject to removal by the President at will, as is the Attorney General, whose order of deportation was the subject of the legislative veto involved in *Chadha*. But neither of these differences between the two cases has any bearing on the resolution of the constitutional issue.

1.a. As we have explained in our Brief in *Chadha* (at 17-43), the explicit procedural requirements of bicameral action and presentation to the President set forth in Article I, Section 7 of the Constitution apply in all instances in which Congress seeks to exercise its legislative powers and thereby affect the legal rights and duties of persons outside the Legislative Branch. With respect to the requirement of bicameralism, this is clear from Article I, Section 1, which vests "*All* legislative Powers" jointly in the Senate and House of Representatives, and from Article I, Section 8, which provides that "The Congress," not either of its Houses standing alone, shall have the enumerated powers. With respect to the requirement of presentation to the President, Clause 2 of Article I, Section 7 makes clear that "*Every* Bill which shall have passed the House of Representatives and the Senate" must be presented to the President (emphasis added). And if there were any doubt, Clause 3 of the same section provides that "*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" (emphasis added)—*i.e.*, all resolutions and votes constituting the exercise of the legislative powers conferred by

Article I, Sections 1 and 8—must be presented to the President, even if not actually in the form of a bill.

In view of the explicit and all-embracing constitutional text, the requirements of bicameralism and presentation to the President apply whether the conduct that is the subject of the congressional action is that of the President himself, subordinate officials in the Executive Branch subject to his control, the members of an "independent agency" who may be removed by the President only for cause, or members of the Judiciary, who are entirely independent of the President. These procedural requirements also must be followed whenever the legislative action will have a legal impact on private parties, as the resolution of disapproval in this case plainly did: absent the legislative veto, the Phase II rule issued by FERC pursuant to public law would have gone into effect and altered the prices consumers paid for natural gas. Moreover, just as the explicit text of Article I, Section 7 requires bicameral action and presentation to the President in the case of public laws of general applicability as well as private laws affording relief or benefits to an individual person, so too that text forecloses a legislative veto of agency action that does not comport with the constitutional requirements, irrespective of whether the veto disapproves an order adopting a rule affecting the public at large, as in this case, or an order entered at the conclusion of an adjudicatory proceeding that affords relief or benefits to an individual person, as in *Chadha*.

b. The intent of the Framers underlying the pertinent constitutional provisions no more permits any distinction to be drawn between *Chadha* and this case than does the text of the Constitution itself. The requirements of bicameral action and presentation to

the President were intended to serve as formidable checks against improvident action by the Legislative Branch by ensuring an opportunity for due deliberation by the two differently constituted Houses and an independent review by the President. See our Brief in *Chadha*, at 28-31. In this case, the court of appeals found that a principal reason for the passage of the resolution of disapproval was the dissatisfaction of many Members of the House of Representatives with the statutory policy of incremental pricing embodied in the Natural Gas Policy Act of 1978, in light of changed circumstances, and their view that this statutory policy should be abandoned or its implementation delayed. See J.S. App. 13a-15a, 79a-80a. As the court below observed, such alteration of policy embodied in a previously enacted law "is precisely the kind of decision that the Constitution envisions will be made only by both houses with the participation of the President through his veto power" (*id.* at 80a).

The requirements of bicameralism and presentation to the President also were intended to prevent an aggrandizement of the Legislative Branch at the expense of the other two Branches, and the Presidential veto power therefore also serves in part as a defensive weapon by which the President may protect against encroachment by the Legislative Branch. See our Brief in *Chadha*, at 27-28, 29-30. A legislative veto of an order issued by an independent agency does not nullify a specific action that was subject to the President's control. But this hardly renders the Presidential veto power superfluous, even to the extent it is viewed as a means of defense against aggrandizement and encroachment by the Legislative Branch.

Members of an independent agency such as FERC, no less than members of the Cabinet subject to Presi-

dential direction, are Officers of the United States appointed by the President and responsible for the administration of public laws. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 140-141. The President's broad constitutional obligation to "take Care that the Laws be faithfully executed" (Article II, Section 3)—even if he cannot actually direct the *manner* of their execution in a particular instance—therefore requires preservation of the President's veto power within the system of checks and balances fashioned by the Framers as a defensive mechanism to protect against encroachment by the Legislative Branch upon the administration of the laws even by independent agencies. Indeed, precisely because the day-to-day administration of the laws by an independent agency is not subject to Presidential control, it is critical that the President's veto power be preserved undiminished to enable him at least to exercise the detached review of legislative measures the Framers intended when Congress, or one of its Houses, seeks to alter the manner in which such an agency carries out its statutory mandate.[4]

Moreover, if the check of the Presidential veto power could be readily circumvented by Congress merely by vesting authority to administer the laws in an independent agency not subject to the President's direct control, Congress could be expected to pursue that course, thereby further encroaching upon the President's administration of the laws generally and his responsibility to review legislative measures intended to alter the manner in which the laws are

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[4] The Presidential veto power also may serve to prevent aggrandizement of the Legislative Branch at the expense of the Judiciary, which likewise is independent of Presidential control.

carried out. Thus, recognition of a power in Congress or one of its Houses to exercise a veto over the action of an independent agency in enforcing the laws, without presentation of the measure to the President, could substantially diminish the stature of the President in the tripartite system of government embodied in the Constitution. Such a result would quite directly implicate the self-defensive purposes of the Presidential veto power.

2.a. For reasons similar to those just discussed, the fact that the instant case involves rulemaking and an independent agency does not affect the second ground on which legislative veto devices are unconstitutional: their incompatability with the doctrine of separation of powers. The Court held in *Buckley* v. *Valeo* that the performance of any significant governmental duty pursuant to a public law must be performed by Officers of the United States appointed by the President or otherwise in accordance with the Appointments Clause; those duties may not be performed by officials appointed by Congress. As we explain in our Brief in *Chadha* (at 48-50), it follows a fortiori from *Buckley* that if Congress cannot appoint those who will administer the law, it cannot take the more extreme step of actually reserving to itself the ultimate determination of how the laws will be administered. And because the Court's opinion in *Buckley* explicitly applies to rulemaking (424 U.S. at 140), the doctrine of separation of powers invoked in *Buckley* likewise bars a legislative veto of agency rulemaking.

b. The conclusion that the legislative veto violates the doctrine of separation of powers is not altered by the fact that the members of FERC may be removed by the President only for cause. As the court

of appeals observed (J.S. App. 88a-89a), this Court in *Buckley* applied the doctrine and its particular manifestation in the Appointments Clause in the context of the Federal Election Commission, which also is an independent agency. It is true that the President does not have the degree of control over the decisionmaking of independent agencies that he does with respect to actions of Officers of the United States who are subject to his removal at will. But as the court below observed, "it is an enormous, and unwarranted, jump from this to the conclusion that Congress may itself interfere with an independent agency's decisions without regard to separation of powers" (J.S. App. 89a). If Congress reserves to itself or one of its Houses the authority to veto orders issued by an independent agency, it possesses the power both to make the law and participate in its execution—the very concentration of powers in the Legislative Branch that the Framers intended to foreclose.

3. The Constitution thus furnishes no basis for distinguishing this case from *Chadha* with regard to the validity of the legislative veto. Indeed, the Senate and House of Representatives do not argue that the two cases are constitutionally distinguishable. At the same time, we fully appreciate that the fundamental importance of the constitutional issue presented may lead the Court to conclude that it should have before it the experience with a second legislative veto in order to assure that all aspects of the issue have been addressed.[5]

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[5] A constitutional challenge to the two-House legislative veto provision in Section 21(a) of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. IV) 57a-1(a), is now pending be-

4. In any event, whatever considerations might warrant plenary review in this case of the constitutionality of the legislative veto device plainly do not extend to the various subsidiary issues on which a number of parties also have sought review. A proliferation of such issues would detract from the Court's and the parties' consideration of the fundamental constitutional question.

Thus, for example, the question whether FERC was required to comply with the notice and comment requirements of the APA when it revoked the Phase II rule is not one of general importance, and FERC itself has not sought review on that issue. The court of appeals made clear that FERC could reconsider the wisdom of the rule in proceedings on remand (J.S. App. 104a).[6] This Court's refusal to consider the validity of FERC's revocation therefore would not result in the imposition of a Phase II rule that has not received appropriate scrutiny by the agency in light of changed circumstances.

Similarly, the questions of standing, political question, and adverseness of parties presented by the House (82-209 Pet. I (Questions 4, 5 and 6), 23,[7] are essentially identical to those presented by the House in its brief in *Chadha* and need not be re-

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fore the United States Court of Appeals for the District of Columbia Circuit in a case involving a veto of the FTC's rule concerning deceptive commercial practices in sales of used cars. *Consumers Union of the United States* v. *Federal Trade Commission*, No. 82-1737. That case is scheduled for argument on October 12, 1982.

[6] FERC has not yet taken action on remand in light of the appeals and certiorari petitions filed in this case.

[7] See also 81-2171 J.S. I (Question 1), 13-17).

hearsed here. By the same token, the questions regarding the scope of FERC's rulemaking discretion under Phase II and whether that discretion reflects an undue delegation of authority by Congress (81-2008 J.S. 13-14; 81-2020 J.S. I (Question 4), 25-27) were adverted to only briefly by the court of appeals (J.S. App. 78a n.172), which found that Congress had in fact made a policy judgment in favor of incremental pricing (*id.* at 79a). In any event, consideration of this issue would be premature in the context of the Phase II rule: that rule will not go into effect if the legislative veto is constitutional, and the rule will be the subject of further proceedings before FERC if the veto is unconstitutional and severable, as the court below held.

CONCLUSION

If the Court concludes that consideration of the constitutionality of the legislative veto in *Chadha* would be assisted by having this case before it as well, the Court should note probable jurisdiction in Nos. 81-2020 and 81-2171, which present the constitutional question. In that event, the Court also should grant the certiorari petitions filed by the House and Senate in Nos. 82-177 and 82-209, limited to the questions whether Section 202(c) of the Natural Gas Policy Act is unconstitutional and, if so, whether Subsection (c) is severable from the remainder of Section 202. The Court should limit the briefing in Nos. 81-2020 and 81-2171 to these issues as well. The appeals in Nos. 81-2008 and 81-2151 should be dismissed because they do not seek review of that aspect of the court of appeals' decision holding Section 202(c) of the Natural Gas Policy Act unconstitutional, which would appear to be a require-

ment for invoking the jurisdiction of this Court under 28 U.S.C. 1252.[8]

Respectfully submitted.

REX E. LEE
Solicitor General

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[8] The first paragraph of Section 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional * * *." This language would appear to link the right of appeal to the holding of unconstitutionality by the lower court. See also *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). Where an appeal pursuant to the first paragraph of Section 1252 has been taken, the second paragraph of Section 1252 provides that all other appeals or cross-appeals in the case shall be taken to the Supreme Court. It is this paragraph that would seem to apply to non-constitutional issues. Cf. R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978). When a district court disposes of a non-constitutional issue, appeal ordinarily would be to the court of appeals pursuant to 28 U.S.C. 1291; it presumably is such appeals of right that the second paragraph contemplates will be taken instead to the Supreme Court. There is no independent right of appeal to this Court from a decision of a court of appeals on a non-constitutional issue, and the second paragraph of Section 1252 does not confer such a right merely because some other party has filed an appeal with respect to the constitutional issue. We have addressed a close variant of this question of statutory construction in our Motion to Dismiss in *Beneficial Finance of Kansas, Inc.* v. *United States*, No. 81-583 (filed Nov. 25, 1981).

Treating these jurisdictional statements as petitions for a writ of certiorari (see 28 U.S.C. 2103), the petitions should be denied, because they raise no issue of general importance warranting this Court's discretionary review.

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No. 81-2020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, and
UNITED DISTRIBUTION COMPANIES
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, et al.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

APPELLANTS' REPLY MEMORANDUM

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Appellants,

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CONSUMER ENERGY COUNCIL OF AMERICA, et al.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

APPELLANTS' REPLY MEMORANDUM

The Consumer Energy Council of America, et al. ("CECA") filed on September 3, 1982, a joint Memorandum ("CECA Mem.") in response to appellants' Jurisdictional Statement ("No. 81-2020 J.S."), arguing that this Court should grant plenary consideration limited solely to the constitutionality of the one-house veto. The Solicitor General filed on September 9, 1982, a Memorandum for the United States ("U.S. Mem.") in response to appellants' Jurisdictional Statement, arguing that this Court should limit plenary consideration to the one-house veto and the severability of Section 202(c) of the Natural Gas Policy Act of 1978 ("NGPA").

CECA's suggestion rests on the assumption that an appeal where a United States statute has been held unconstitutional does not warrant plenary consideration unless the constitutional issue must be reached by this Court. CECA Mem. at 8-9. To like effect, excepting the severability issue, is the Solicitor General's recommendation. U.S. Mem. at 19-21.

[1] Pursuant to Rule 28.1 of the Court, appellants' member corporations, and where applicable, parents, subsidiaries and affiliates thereof, are listed in an appendix to appellants' Jurisdictional Statement.

Both suggestions ignore the well-settled principle "that if a case may be decided on either statutory or constitutional grounds, this Court, for sound jurisprudential reasons will inquire first into the statutory question." *Harris* v. *McRae*, 448 U.S. 297, 306-07 (1980); *Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105 (1944) (Frankfurter, J.) (not to pass on constitutional questions unless such adjudication is unavoidable "is one doctrine more deeply rooted than any other in the process of constitutional adjudication"); *see Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it").

There is no reason for this Court to depart from its settled practice. Furthermore, a decision by this Court either that the Federal Energy Regulatory Commission ("FERC") order was not properly revoked, or that Section 202(c) of the NGPA is not severable from the rest of Phase II, would make constitutional adjudication of the one-house veto entirely inappropriate on mootness or inability to grant relief grounds. Both of these principles have their genesis in the case or controversy requirements of Article III of the Constitution and to that extent these issues are fundamental to the Court's jurisdiction. *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975).

CECA's suggestion in its Memorandum at 9 n.4, that the unconstitutional delegation question is not at issue ignores the fact that it was considered, discussed, and decided by the court below. App. at 76a-80a.[2] Since the delegation question is intimately and inextricably intertwined with the severability question, *see* No. 81-2020 J.S. at 19, 25-27, it would make no sense to preclude briefing of the former (as suggested in CECA Mem. at 9), while allowing briefing of the latter (as suggested in U.S. Mem. at 20).

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[2] All references to "App." are to the Appendix to Jurisdictional Statement submitted April 29, 1982 by the Process Gas Consumers Group, et al., in a related case, No. 81-2008.

The Solicitor General's suggestion in his Memorandum at 20 that consideration of the delegation question would be "premature" is misleading. Correctly observing that the FERC proposed rule will not go into effect if the one-house veto is constitutional, and that there will be further proceedings before FERC if the veto is unconstitutional and severable (and not moot), the Solicitor General fails to add that consideration of the one-house veto issue is "premature" in the same sense, i.e., the rule will not go into effect if the delegation is unconstitutional, and there will be further proceedings before FERC if the delegation is constitutional (and not moot). The one constitutional question is no more premature than the other.

The Court should permit briefing and argument on all four questions presented by appellants.

Respectfully submitted,

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